SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 198

NORMAN C. SCHALLER,

Petitioner,

vs.

CITY OF PHILADELPHIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

MICHAEL FRANCIS DOYLE,
EDWARD I. CUTLER,
Counsel for Petitioner.

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CITY OF PHILADELPHIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Norman C. Schaller, respectfully prays that a Writ of Certiorari issue herein to review a certain final decision of the Superior Court of the State of Pennsylvania, and in support thereof presents the following statements, questions, and reasons:

I. Summary and Short Statement of the Matter Involved.

This is an action of assumpsit commenced by the City of Philadelphia, Pennsylvania, in the Municipal Court of Philadelphia, to establish petitioner's responsibility for a tax

upon his salary for 1940 under a City Income Tax Ordinance approved December 13, 1939. The statement of claim alleges that petitioner resides in the City of Philadelphia and is employed in the Philadelphia Navy Yard, a Federal Area, by the United States Government (R. 3). Petitioner has questioned the right of the City to exact such a tax from employes of the Federal Government engaged in defense work in Federal Areas during 1940, under the Constitution of the United States and the Act of October 9, 1940, 54 Stat. 1060, 4 U. S. C. A. § 14, by Affidavit of Defense Raising Questions of Law (R. 5).

The Municipal Court decided in favor of the City on the pleadings, in an opinion written by Judge Tumolillo (R. 6). Upon appeal, the Superior Court of Pennsylvania affirmed the judgment of the Municipal Court on March 13, 1942 (R. 20), followed by opinion rendered on March 30, 1942 (R. 14). Petitioner applied to the Supreme Court of Pennsylvania, the State court of last resort, for the allowance of an appeal (R. 21), but the appeal was refused on April 20, 1942 (R. 24).

II. Statement as to Jurisdiction.

(a) *Statutory Provision Sustaining Jurisdiction.*

The jurisdiction of the United States Court in this case is predicated on Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936.

(b) *State and Federal Statutes, the Validity of Which is Involved.*

The State legislation involved consists of the Act of Assembly of the Commonwealth of Pennsylvania known as the Sterling Act of August 5, 1932, P. L. 45, 53 P. S. § 4613, the City of Philadelphia Income Tax Ordinance

approved December 13, 1939, and the Income Tax Regulations issued thereon by the City's Receiver of Taxes.

The Act of 1932 gave the City of Philadelphia general powers to levy:

> "* * * taxes on persons, transactions, occupations, privileges, subjects and personal property within the limits of such city of the first or second class, as it shall determine. * * *"
>
> "It is the intention of this section to confer upon cities of the first and second classes the power to levy, assess and collect taxes upon any and all subjects upon which the Commonwealth has the power to tax but which it does not now tax or license" (R. 7).

The pertinent provisions of the City Income Tax Ordinance, which seeks to subject to tax all persons employed by any governmental body in Philadelphia, regardless of residence, and all residents of Philadelphia, regardless of where or by whom employed, are as follows:

> "Employer. An individual, copartnership, association, corporation, governmental body or unit or agency, or any other entity, who or that employs one or more persons on a salary, wage, commission, or other compensation basis."
>
> "SECT. 2. IMPOSITION OF TAX. An annual tax for general revenue purposes of one and one-half per centum is hereby imposed on (a) salaries, wages, commissions and other compensation earned after January 1, 1940, by residents of Philadelphia; and on (b) salaries, wages, commissions and other compensation earned after January 1, 1940, by non-residents of Philadelphia for work done or services performed or rendered in Philadelphia; and on (c) the net profits earned after January 1, 1939, of businesses, professions or other activities conducted by such residents, and on (d) the net profits earned after January 1, 1939, of businesses,

professions or other activities conducted in Philadelphia by non-residents.

"The tax levied under (a) and (b) herein shall relate to and be imposed upon salaries, wages, commissions and other compensation paid by an employer or on his behalf to any person who is employed by or renders services to him. The tax levied under (c) and (d) herein shall relate to and be imposed on the net profits of any business, profession or enterprise carried on by any person as owner or proprietor, either individually or in association with some other person or persons."

"SECT. 4. COLLECTION AT SOURCE. Each employer within the City of Philadelphia who employs one or more persons on a salary, wage, commission or other compensation basis shall deduct, monthly or more often than monthly, at the time of the payment thereof, the tax of one and one-half per centum of salaries, wages, commissions or other compensation due by the said employer to the said employee and shall, on or before the fifteenth day of the month next following the said deduction make a return and pay to the Receiver of Taxes the amount of tax so deducted. Said return shall be on a form or forms furnished by or obtainable from the said Receiver of Taxes and shall set forth the names and residence of each employee of said employer during all or any part of the preceding month, the amounts of salaries, wages, commissions or other compensation earned during such preceding month by each of such employees, together with such other pertinent information as the Receiver of Taxes may require: Provided, however, That the failure or omission by any employer, either residing within or outside of the City, to make such return and/or pay such tax, shall not relieve the employee from the payment of such tax and the compliance with such regulations, with respect to making returns and payment thereof, as may be fixed in this ordinance or established by the Receiver of Taxes."

The regulations adopted by the Receiver of Taxes provide that anyone who is domiciled in Philadelphia is within the Ordinance:

> "(h) The term 'Resident' means an individual, copartnership, association, or other entity domiciled in the City of Philadelphia."

The regulations further provide specifically that the ordinance applies to residents who render services anywhere as employes of the Federal Government and non-residents who render such services within the City of Philadelphia, in the following words:

> "The following are the items subject to this tax:
> (a) Salaries, bonuses or incentive payments received by an individual, whether directly or through an agent and whether in cash or in property, for services rendered on and after January 1, 1940.
>
> (5) As an officer or employee (whether elected, or appointed, enlisted or commissioned) of a governmental administration, agency, arm, authority, board, body, branch, bureau, department, division, section or unit of the United States Government or of a corporation created and owned, or controlled by the United States Government or any of its agencies."

The pertinent portions of the Act of Congress of October 9, 1940, 54 Stat. 1060, 4 U. S. C. A. § 14, the construction and validity of which are involved, provide:

> "Sec. 2 (a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in

any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940."

(c) Dates of Judgment and Application for Appeal.

The judgment of the Superior Court of Pennsylvania was rendered on March 13, 1942. The opinion followed on March 30, 1942. The application for the allowance of an appeal was filed in the Supreme Court of Pennsylvania on April 4, 1942, and that Court, by a *per curiam* order, refused to allow an appeal on April 20, 1942. This application for appeal is presented on the 2nd day of July, 1942.

(d) Nature of the Case, Federal Questions Raised, Rulings of the Court, Substantial Questions.

This was an action to recover municipal taxes on Petitioner's compensation received from the Federal Government as a defense worker in the Philadelphia Navy Yard.

The federal questions sought to be reviewed were first raised in the Municipal Court by Affidavit of Defense Raising Questions of Law, in the following words (R. 5):

"1. The Constitution and laws of the United States, including Act No. 819 of the 76th Congress, approved October 9, 1940, prohibit the plaintiff from exacting a tax on compensation received by defendant from the United States Government for services rendered in a Federal area during the year 1940.

"2. Plaintiff has no power under the Constitution and laws of the Commonwealth of Pennsylvania, including the Act of August 5, 1932, P. L. 45, to exact the aforementioned tax."

The Municipal Court rejected Petitioner's contention both as to the Federal Constitution and the Act of 1940. With respect to the Constitution, the Court stated (R. 8, 9):

> "The decision of the United States Supreme Court in the case of Graves *v.* O'Keefe, 306 U. S. 466, definitely established the right of a state to include Federal employees in a general statute imposing a tax on incomes."
>
> "The defendant offers the ingenious theory that because the President proclaimed a state of unlimited emergency on May 27, 1941, the City is prohibited from imposing a tax on Federal defense workers. He argues that if the tax may be imposed on the defendant, it can be imposed on residents of Philadelphia who enter the nation's armed forces. The certainty of an aroused and violent public opinion is sufficient insurance against any attempt by the Receiver of Taxes to impose the tax on persons who volunteer or who are inducted into the armed forces by virtue of the Selective Service Act. But the defendant is entitled to no such solicitous concern. He is a well paid civilian employee whose earnings for 1940 exceeded $2500. There is no more reason to exempt workers at the Navy Yard from the provisions of the Wage Tax ordinance than there is to exempt the thousands of employees in private industry who are engaged in work vital to national defense."

Concerning the Act of 1940, the Court held (R. 8, 9):

> "The defendant argues that the provisions of the Act of Congress approved October 9, 1940, Public Act No. 819 of the 76th Congress, 4 F. C. A. Section 13 et seq., prohibit the imposition of taxes on salaries earned during 1940 in Federal areas such as the Navy Yard.
>
> "Section 2 (a) provides: 'No person shall be relieved from liability for any income tax levied by any state, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by rea-

son of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such state or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such state to the same extent and with the same effect as though such area was not a Federal area.'

"Section 2 (b) provides: 'The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940.'

"The defendant contends that this must be construed as a prohibition on any tax on salaries earned in 1940. This argument would have force if the City attempted to tax the 1940 salaries of non-residents who work in the Navy Yard. But the defendant in this case is a resident of Philadelphia and the tax is imposed because of such residence and not because of the place he works. The City had authority to impose the tax irrespective of the Act of October 9, 1940, and hence is not affected by the provision that it shall not apply to salaries earned in 1940."

The refusal of the Municipal Court to sustain the Affidavit of Defense was assigned as error in the Superior Court (R. 13):

"2. The learned court below erred in overruling defendant's first point of law, as follows:

'1. The Constitution and laws of the United States, including Act No. 819 of the 76th Congress, approved October 9, 1940, prohibit the plaintiff from exacting a tax on compensation received by defendant from the United States Government for services rendered in a Federal area during the year 1940.' (R. 5.)

"Judgment of the court thereon:

'The defendant's questions of law are overruled and judgment is entered for the plaintiff in the sum of $40.45, representing the amount of tax due thereon with interest at 6% and a penalty of one-half of one per cent per month for four months.' (R. 12.)"

On the constitutional objection, the Superior Court said (R. 17):

> "When a former decision is overruled, the reconsidered pronouncement will be considered as the law from the beginning. People ex rel. Rice *v.* Graves et al., 273 N. Y. S. 582, affirmed in 270 N. Y. 498, 200 N. Y. 288; Certiorari denied, 298 U. S. 683.
>
> "Finally, defendant contends that, in any view, a State taxing unit may not burden the Federal Government with a tax upon those engaged in the national defense in time of war. (R. 19.)
>
> "We may assume that the wages which defendant received from his federal employer are comparable with the wages paid by private employers for like services. If his contention were valid, the profits of manufacturers and all others who supply war materials would also be exempt from taxation. Graves *v.* O'Keefe, pp. 480, 481, refutes the argument in this language: The tax 'is measured by income which becomes the property of the taxpayer when received as compensation for his services; and the tax laid upon the privilege of receiving it is paid from his private funds and not from the funds of the government, either directly or indirectly. The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source is no longer tenable * * * and the only basis for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that the economic burden of the tax is in some way passed on so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions.' A tax of $38.95 on an income of $2,596.73 could not work that result."

The Superior Court also dismissed the Act of Congress of 1940 with the following statement (R. 18-19):

> "Defendant's second contention is that even if the Sterling Act clothed the city with the power to tax

federal incomes, Congress on October 9, 1940, by Public Act No. 819, 54 Stat. 1060, 4 U. S. C. A. 14, has affirmatively prohibited a tax on such salaries earned prior to December 31, 1940, in a federal area such as the Philadelphia Navy Yard. The act, in effect, declared that residence within a federal area or the receipt of income from transactions occurring therein or 'services performed in such area' shall not relieve any person from liability for any income tax levied by any duly constituted taxing authority. The Act further provides that it shall be applicable only to income received after December 31, 1940. The relevant sections of the Act are quoted below.

"It is not necessary to refer to the reason for this Act. For our purpose we need only observe that it is no more than declarative of the existing law as established by Graves *v.* O'Keefe. The Act provides that it shall be applicable to income received after December 31, 1940, but nowhere in it is there any indication of congressional intent that incomes earned prior thereto shall be exempt. The power to grant tax exemptions, except where there is constitutional immunity, is at least doubtful; the United States Supreme Court in Graves *v.* O'Keefe referred to the question but did not find it necessary to answer it, p. 478. Since this Act creates no exemption it has no application to the question involved, except to recognize the city's power to tax incomes earned in a federal area after December 31, 1940. We know of no prohibition or exemption applicable to similar incomes earned after the decision in Graves *v.* O'Keefe and prior to that date."

This case raises substantial questions of Federal law not heretofore considered by the United States Supreme Court: Whether the decision in *Graves* v. *N. Y. ex rel. O'Keefe,* 306 U. S. 466, was intended to apply to all persons employed by the Federal Government, without exception, regardless of the nature of their duties, their place of residence, and the surrounding circumstances; whether the

effect of a decision overruling prior decisions on the question of constitutionality is to render the prior decisions wholly inoperative and non-existent; whether the Act of October 9, 1940, 54 Stat. 1060, 4 U. S. C. A. § 14 prohibits local taxation of salaries earned by Federal employes in Federal areas prior to December 31, 1940; and whether Congress has the power to exempt Federal employes from local taxation.

The scope of the *O'Keefe case* has not been decided by your Honorable Court, and the present case raises the substantial question whether that ruling applies to all persons receiving compensation from the United States Government regardless of residence, regardless of the nature of their duties, regardless of the fact that their duties are performed in a Federal area, and regardless of the existing emergency.

Nor has this Court affirmatively decided whether the decisions overruled by the *O'Keefe case* are completely nullified and cannot ever be considered operative facts. The effect of that case is a question of constitutional law. It is involved in the present case by virtue of the opinion of the Court below that the earlier decisions are not to be considered as operative facts, in considering whether the Pennsylvania legislature intended to confer on the City of Philadelphia the power to tax Federal salaries and wages.

The question whether the Act of 1940 prohibits local taxation within Federal areas prior to December 31, 1940, is also a substantial Federal question, involving the interpretation of an Act of Congress not heretofore passed upon, namely, whether the permission to tax after that date, with the express limitation that it shall not apply to earlier transactions, does not constitute a prohibition of a tax on earnings before that date.

The further question raised is whether, assuming that a State could constitutionally tax salaries and wages earned

by government employees in Federal areas, Congress may nevertheless constitutionally prohibit such a tax, as petitioner contends under the Act of 1940.

III. The Questions Presented.

(a) Has a state or municipality the power to tax the compensation of all persons employed by the Federal Government, without exception, regardless of the nature of their duties, their place of residence, and the surrounding circumstances; particularly was the decision in *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, intended to apply to persons performing military, naval or defense duties?

(b) Did the *O'Keefe case* so completely nullify prior law that the cases which it overruled cannot be considered operative facts prior to the date of the *O'Keefe* decision?

(c) Did Congress, by the Act of October 9, 1940, 54 Stat. 1060, 4 U. S. C. A. § 14, intend to prohibit local taxation of salaries earned by federal employes in federal areas prior to December 31, 1940?

(d) If so, has Congress the power to prohibit local taxation of federal compensation?

IV. Reasons Relied On for the Allowance of the Writ.

None of the foregoing questions has ever been answered by this Court, the State court of last resort has not afforded a hearing on the issues presented, and the inferior courts did not adequately dispose of these questions. The questions raised are serious and vital to numerous residents of the City of Philadelphia who receive pay from the Federal Government, including those engaged in military duty outside the country for meagre remuneration, as well as non-residents who are performing their duties in the Government services within the City.

Petitioner presents herewith his brief in support of the petition.

Wherefore your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Superior Court of Pennsylvania, requiring that court to certify the whole record of the case herein to this Court for review and determination.

NORMAN C. SCHALLER.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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1. The O'Keefe decision was not intended to apply to all federal employes regardless of circumstances.

Your petitioner argued before the courts of Pennsylvania that the decision in *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, was not intended to apply to persons such as petitioner who are engaged in military, naval or defense work on behalf of the United States Government itself, particularly during a national emergency and particularly where the work is being performed in a federal area. Your Honorable Court is respectfully referred to pages 20 et seq. of the printed brief presented to the Superior Court in conjunction with the printed record submitted there.

Petitioner believes that the *O'Keefe case*, in overruling prior decisions which had declared all employes of federal instrumentalities immune from local taxation, must be strictly construed. Such a major change of constitutional doctrine, in derogation of well settled and universally accepted principles of fundamental law, should be subject to the same rules of construction as statutory changes of common law principles.

The *O'Keefe decision* should be confined to ordinary cases of federal employment. It should not extend, as required by the reasoning of the respondent and of the Pennsylvania courts, to all persons receiving federal compensation who either work in the City of Philadelphia or are domiciled in that city. Under their reasoning, a private in the United States Army, domiciled in Alabama but ordered to Philadelphia as part of an anti-aircraft detachment, would be required to pay to the City of Philadelphia a tax on his pay of $21 per month for the privilege of protecting the City against destruction by invading bombers.

Or, a sailor in the United States Navy, technically domiciled in the City of Philadelphia but serving his Country on the high seas, would be subjected by the City to a tax on his meagre earnings. Similarly, a defense worker residing across the Delaware River in Camden, New Jersey, who is transported to work in the Philadelphia Navy Yard by a federally owned ferry and who does not step on Philadelphia soil or use the City's facilities, would be expected to contribute to the City's support.

Certainly this Court did not contemplate such outrageous consequences in deciding the *O'Keefe* case. The inevitable conclusion must be that there are certain exceptions to the general rule laid down in that decision, and that petitioner and persons similarly situated fall within those exceptions. The Superior Court's statement that Federal employes are in the same position as manufacturers and all others who supply war materials for profit ignores the entire history of the constitutional immunity of government workers from local taxation and the distinction above drawn. Long before the *O'Keefe* decision, it was recognized that contractors dealing with the Federal government are in an entirely different position from those who work directly for the Government and receive government salaries or wages.

2. Overruled decisions are not entirely inoperative.

The authorities previously holding that all employes of Federal instrumentalities enjoyed a constitutional immunity from local taxes on their pay, while overruled by the *O'Keefe* case, cannot be considered as completely void and non-existent. The Pennsylvania courts have therefore erred in holding that those prior authorities are to be ignored. This Honorable Court is again referred to the printed brief in the Superior Court, wherein it was urged at pages 7 to 18 that the prior constitutional doctrine was

to be considered in construing the State tax law which was adopted in 1932, six years before the *O'Keefe* case was decided. The Superior Court misconceived your petitioner's argument and also the effect of an overruled decision by stating that the "reconsidered pronouncement will be considered as the law from the beginning," citing *People ex rel. Rice* v. *Graves, et al.*, 273 N. Y. S. 582. Examination of the latter case shows that there is great doubt on the effect of an overruled decision and that the case is scarcely authority for the proposition for which it is cited.

A Federal question is thus presented. The Pennsylvania courts have predicated their interpretation of State law on an erroneous conception of Federal law, and this warrants the intervention of the United States courts: *Standard Oil Co. of Cal.* v. *Johnson*, No. 1125, October Term, 1941, opinion by Mr. Justice Black, June 1, 1942. This recent decision involved a California tax levied on the sale of motor vehicle fuel, which the State courts had held applicable to sales at Army post exchanges. Because the State decision was based on the incorrect assumption that such exchanges are not government instrumentalities, this Court reversed the decision of the California court.

In like manner, the Pennsylvania interpretation should be reversed. This Court has never decided that an overruled decision is to be treated as completely non-existent. On the contrary, it is construed to be part of contracts drawn before the "reconsidered pronouncement" is rendered, and, under like reasoning, it should be construed as part of statutory enactments drawn before the subsequent decision. Hence, the prior law should be considered part of the Pennsylvania legislature's tax law of 1932. The Pennsylvania courts, in holding otherwise, have done so only because of their erroneous conclusion that the decisions which were overruled by the *O'Keefe* case in 1938 had no effect whatsoever in 1932.

3. Act No. 819 of the 76th Congress prohibits the tax involved.

In petitioner's brief before the Superior Court, at pages 18 to 20, the effect of Public Act No. 819, 54 Stat. 1060, 4 U. S. C. A. 14, is fully discussed. Petitioner urges that the Act prohibits local taxation on salaries earned in Federal areas prior to December 31, 1940. The Superior Court is in error when it holds that the Act is merely declarative of the law established in the *O'Keefe* case. It ignores the distinction between immunity based on employment by a Federal instrumentality and immunity based on exclusive jurisdiction over Federal territory. Federal areas, such as the Philadelphia Navy Yard, enjoy an immunity predicated on legislative grant from the Commonwealth of Pennsylvania and on the surrender of sovereignty to the Federal government. The only purpose of the above Act was to restore to the States a certain amount of surrendered sovereignty. It had nothing to do with the *O'Keefe* case or the doctrine therein expressed.

Some of the limitations on the permissive effect of that Act were recently carried out in *Query, et al.*, v. *United States of America, et al.*, No. 619, October Term, 1941, opinion by Mr. Justice Black, June 1, 1942, where a South Carolina sales tax was held inapplicable to sales on Army post exchanges despite the Act.

Subsection (b) of Section 2 of the Act of 1940, in providing that the provisions of Subsection (a) shall apply only to income received after December 31, 1940, makes it evident that income received prior to that date is exempted. The income involved in the present case was all earned and received prior to that date.

4. Congress may constitutionally exempt such income.

The Superior Court of Pennsylvania expresses doubt as to the power of Congress to exempt income received in a Federal area from local taxation. The exclusive character of Congressional jurisdiction over Federal areas should eliminate all doubt. If Congress considers it wise to immunize transactions or income accruing in Federal areas from local taxes, such action rests entirely within the discretion of Congress. Certainly a tax on income earned in a Federal area has some effect on the operation of the Federal area. If Congress wishes to eliminate that effect, it is entirely up to Congress; *Federal Land Bank of St. Paul* v. *Bismark Lumber Co., et al.*, 314 U. S. 95; see also *Alabama* v. *King & Boozer*, 314 U. S. 1, 8.

5. Conclusion.

The opinion of the Superior Court of Pennsylvania shows that a review of a higher court was anticipated. The Supreme Court of Pennsylvania has not seen fit to review the case. The petitioner's sole resort, therefore, is the Supreme Court of the United States.

For the first time in the recorded jurisprudence of the United States of America, an attempt has been made to tax the pay of soldiers, sailors, and officers, while the country is at war. This tax has been imposed by a subdivision of a State. If such a tax is declared proper and legal by the courts, a most serious situation affects the Government of our country.

The question of the right of a municipality to tax citizens living in other States, while employed temporarily in that municipality, or while employed in Federal areas not under its control, is also of great importance.

The Supreme Court is respectfully requested to consider this tax legislation, as a whole, as it applies to Federal employes, officers, and serviceman, so that an authoritative expression on these matters may be obtained. The Pennsylvania courts have not adequately disposed of these Federal questions.

Respectfully submitted,

MICHAEL FRANCIS DOYLE,
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(1121)

No. 1008

(30)

No. 335. October Term, 1941.

IN THE

Superior Court of Pennsylvania

PHILADELPHIA DISTRICT.

CITY OF PHILADELPHIA,
Plaintiff,

v.

NORMAN C. SCHALLER,
Appellant.

Brief for Appellant and Record.

Appeal From the Judgment of the Municipal Court of the County of Philadelphia, as of May Term, 1941, No. 55.

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TABLE OF CASES.

I. STATEMENT OF THE QUESTIONS INVOLVED.

1. Did the General Assembly of Pennsylvania, by the Sterling Act of August 5, 1932, P. L. 45, 53 P. S. Section 4613 et seq., intend to grant to the City of Philadelphia the power, which the Commonwealth then lacked (or presumptively lacked), to impose a tax upon compensation paid to officers and employes of the United States Government?

Answered "Yes" by the court below.

2. Does the City of Philadelphia have the power, under the Constitution and laws of the United States, including Act No. 819 of the 76th Congress, approved October 9, 1940, 4 F. C. A., Section 13 et seq., to levy a tax upon compensation paid by the United States Government to its officers and employes for services performed in a Federal area during the year 1940?

Answered "Yes" by the court below.

3. Does the City of Philadelphia have the power, in view of the Constitution of the United States, to levy a tax upon compensation paid by the United States Government to persons engaged in military and naval services and other Federal defense work during a period of national emergency?

Answered "Yes" by the court below.

II. HISTORY OF THE CASE.

This case arises for argument upon the pleadings, which consist of a statement of claim in assumpsit (2a) and an affidavit of defense raising questions of law (4a). The statement of claim was filed in the Municipal Court by the City of Philadelphia to establish the responsibility of appellant for a tax, under the terms of the City Income Tax Ordinance approved December 13, 1939, upon his salary for 1940.

Appellant, a resident of Philadelphia, is an employe of the United States Government. During the year 1940, his services were rendered exclusively in the Federal area known as the Navy Yard at League Island, near Philadelphia.

By the terms of the above Ordinance, a tax of 1½% per annum is imposed upon the salaries, wages and other compensation of persons who reside or work in Philadelphia, to be collected at the source by employers within the City, beginning on January 1, 1940. The various Federal agencies in Philadelphia, as representatives of the sovereign United States, have refused to deduct the tax from the pay envelopes of Federal employes. Consequently, the City has made efforts to collect the tax directly from the employes themselves.

Due to the public pronouncements of the City authorities that employes of the Navy Yard are subject to the tax, and without having first obtained the advice of counsel, appellant filed a return prior to March 15, 1941, and delivered a check to the Receiver of Taxes in the amount of $38.95, constituting 1½% of his 1940 salary. Thereafter, upon the advice of counsel that a reasonable dispute existed as to whether his salary was subject to the tax, he ordered payment on the check stopped before it was presented for payment to the drawee bank.

The statement of claim was served upon appellant on May 14, 1941. Simultaneously, proceedings were begun against a number of similarly situated Navy Yard employes. The present case was selected as a test case and stipulations were filed in twelve of the other cases on May 26, 1941, with the approval of the court below, to the effect that the ultimate judgment here reached should be controlling in all the cases.

On May 23, 1941, appellant's affidavit of defense was filed, contesting the power of the City of Philadelphia to levy a tax upon the salaries of Federal employes such as defendant, under Federal and State law. On June 27, the court below (Tumolillo, J.) heard arguments on the legal questions involved, and on July 2 overruled the questions raised, entering judgment for appellee in the amount of $40.45 (11a).

III. ASSIGNMENTS OF ERROR.

Appellant respectfully makes the following assignments of error:

1. The learned court below erred in overruling defendant's second point of law, as follows:

> "2. Plaintiff has no power under the Constitution and laws of the Commonwealth of Pennsylvania, including the Act of August 5, 1932, P. L. 45, to exact the aforementioned tax." (4a)

Judgment of the court thereon:

> "The defendant's questions of law are overruled and judgment is entered for the plaintiff in the sum of $40.45, representing the amount of tax due together with interest at 6% and a penalty of one-half of one per cent. per month for four months." (11a)

2. The learned court below erred in overruling defendant's first point of law, as follows:

> "1. The Constitution and laws of the United States, including Act No. 819 of the 76th Congress, approved October 9, 1940, prohibit the plaintiff from exacting a tax on compensation received by defendant from the United States Government for services rendered in a Federal area during the year 1940." (4a)

Judgment of the court thereon:

> "The defendant's questions of law are overruled and judgment is entered for the plaintiff in the sum of $40.45, representing the amount of tax due thereon with interest at 6% and a penalty of one-half of one per cent. per month for four months." (11a)

IV. ARGUMENT OF APPELLANT.

The decision of the Municipal Court that the City of Philadelphia has power to tax Federal salaries, if it be permitted to stand unreversed, will have a far-reaching and detrimental effect not only upon the appellant and those who have stipulated that this case shall be controlling, but also upon tens of thousands of officers, enlisted personnel and defense workers of the Navy Yard, and the numerous Philadelphians everywhere who are engaged in the various branches of military and non-military service of the Government. The implications of the case are so extensive that it would be impossible to enumerate or picture them all.

A final decision adverse to appellant will likewise be adverse to all young men resident of Philadelphia, who are inducted into the military naval and air services of the United States, receiving $21.00 per month, despite the following excerpt from the opinion of the court below:

> "The defendant offers the ingenious theory that because the President proclaimed a state of unlimited emergency on May 27, 1941, the City is prohibited from imposing a tax on Federal defense workers. He argues that if the tax may be imposed on the defendant, it can be imposed on residents of Philadelphia who enter the nation's armed forces. *The certainty of an aroused and violent public opinion is sufficient insurance against any attempt by the Receiver of Taxes to impose the tax on persons who volunteer or who are inducted into the armed forces by virtue of the Selective Service Act.*" (8a.) (Emphasis supplied.)

Thus the logic of the lower court's decision has led to its suggestion that lawlessness would in this instance be meritorious. This situation requires relief, and appellant urges that the principles of statutory, if not constitutional, construction require a reversal of the judgment of the court below.

It is conceded that the broad constitutional question whether a State taxing unit may, ordinarily, tax Federal salaries has now been removed by the decision in 1938 in *Graves v. New York ex rel. O'Keefe,* 306 U. S. 466. Without that decision, it is safe to assume that the Receiver of Taxes of Philadelphia would not have included in the Income Tax Regulations the provision that salaries received after January 1, 1940 as an officer or employe of the United States Government are subject to the City payroll tax.

Appellant contends, however, that the City lacks the necessary authorization from the General Assembly to levy the tax here involved—this is the principal contention; also that Congress has affirmatively prohibited a tax for the year 1940 on salaries earned in Federal areas such as the Philadelphia Navy Yard; and that during a national emergency such as now exists a State taxing unit cannot burden the Federal Government with a tax upon those engaged in the national defense.

The first two questions are primarily matters of statutory construction, to determine the scope of the City's taxing power. The last is a matter of constitutional law based on facts of which the Court may take judicial notice. The questions are purely questions of law. There are no factual issues, and no issue of tax exemption or class favoritism is involved.

A. The City of Philadelphia Has No Statutory Power to Levy a Tax Upon Federal Salaries.

(Assignment of Error 1.)

As stated by the lower court (6a), the asserted power of the City to levy a tax upon appellant's salary must be found in the *Act of August 5, 1932*, P. L. 45, 53 P. S. Sec. 4613, known as the Sterling Act. Because of the circumstances surrounding the adoption of that Act, appellant is strongly of the belief that the legislature did not intend to grant to the City the power to tax Federal salaries.

Section 1 of the Sterling Act provides that cities of the first and second classes may levy:

> ". . . taxes on persons, transactions, occupations, privileges, subjects and personal property within the limits of such city of the first or second class, as it shall determine. . . ."
>
> "It is the intention of this section to confer upon cities of the first and second classes the power to levy, assess and collect taxes upon any and all subjects upon which the Commonwealth has the power to tax but which it does not now tax or license." (6a.)

It is to be noted that the Act speaks only in broad, general terms. There is no clearly defined intention to levy taxes on any particular group of persons.

There is no doubt what would have happened if the present case had arisen before this Court immediately after the adoption of the Sterling Act, or any time prior to the decision of the United States Supreme Court in 1938 of the *Graves* case, supra. The holding would necessarily have been (1) that the City could not constitutionally extract a tax from appellant upon his salary as a Government employe, or (2) that the legislature was presumed to have intended a con-

stitutional result in the Sterling Act, and therefore, it had not delegated to the City the power to tax Federal salaries.

It should be unnecessary to elaborate upon the history of the constitutional doctrine of intergovernmental immunity as that doctrine has been applied to public salaries. One of the important cases on this subject was **Dobbins v. Erie County,** 16 Peters (41 U. S.) 435. In that case the County of Erie, under a prior statute delegating tax powers to municipalities in Pennsylvania, had attempted to levy a tax upon the salary or occupation of a captain of the United States revenue cutter service at the Erie station. Captain Dobbins was a resident of Erie County and had voted there for a long time. The proceeding went from the state courts to the United States Supreme Court, which held, in the year 1842, that such a tax could not constitutionally be imposed, thus following the time-honored principle of constitutional government set forth in **M'Cullough v. Maryland,** 4 Wheat. 316, that the power to tax constitutes the power to destroy and that a state should not be empowered to destroy the Federal Government by burdening its instrumentalities and agents with taxation.

For a century, more or less, it was consequently recognized as the law of the United States and of Pennsylvania that the state and its municipalities had no power to tax Federal salaries, and this was considered the law in 1932 when the Sterling Act was enacted by the Pennsylvania legislature. In fact, the traditional rule of the *Dobbins* case, supra, was as recently recognized by this Court as March 13, 1935, in **Short v. Upper Moreland Township School District,** 117 Pa. Superior Ct. 227, where Judge Cunningham traced its history to that date. Certainly this Court could not be criticized for following such a well settled constitu-

tional precept at that time, without anticipating the revolutionary change subsequently by the United States Supreme Court.

In the *Graves* case, supra, the Supreme Court admittedly reversed its previous stand, and held that, under ordinary circumstances, a Federal employe could not resist state taxation on constitutional grounds.

Appellant does not wish to overlook the fact that the courts of our state are not bound, in construing our State Constitution, by decisions of the United States Supreme Court interpreting and applying the Federal constitution. This Court, therefore, can decide that, notwithstanding the decision in the *Graves case,* supra, it is unconstitutional in Pennsylvania for the State, or any subordinate authority, to levy a tax upon Federal salaries.

Regardless, however, whether the courts of Pennsylvania feel constrained to follow the *Graves* case in interpreting the Pennsylvania Constitution, appellant cannot acquiesce in the conclusion of the court below that the City has the requisite statutory authorization to levy this tax. It by no means follows that, because the constitution is not violated, the State has exerted its power to tax Federal salaries. The United States Supreme Court has expressly held that the *Graves* case does not automatically impose a state tax upon Federal salaries. On the contrary, the question of statutory construction remains, and it must be determined under state law whether the legislature has contemplated such taxation:

> **State Tax Commission of Utah v. Van Cott,** 306 U. S. 511.

In order to ascertain the legislature's intention, it is unnecessary to enter into the absorbing and difficult problem of the effect of a decision overruling a prior

decision on constitutional interpretation. Whether the first interpretation remains the law, until and as of the date of the subsequent decision overruling it, or whether the holding of a subsequent decision must be construed as having always been the law, notwithstanding the prior decision, the present question of statutory construction must be the same.

Regardless of the effect of the various decisions interpreting the constitutional doctrine of intergovernmental immunity, the legislature's intention at the time of the Sterling Act (1932) can be easily ascertained. Whether or not the *Dobbins* case (1842) was actually the law at that time, or the *Graves* case (1938) was the law, the legislature conceived the rule of the *Dobbins* case to be in effect, as did every governmental officer, State or Federal, legislative, judicial or executive. When the legislature passed the Sterling Act, one of the attending circumstances was the universally accepted rule that the State could not levy a tax upon Federal salaries. With this rule in mind, the legislature certainly did not intend to confer upon the City of Philadelphia, or any municipality within this State, the power to impose a tax upon that forbidden subject.

The court below, in deciding that the City had the necessary authorization from the legislature, has overridden every axiom of statutory construction with the following statement, unsupported by any substantiating reasoning:

> "The test of municipal power is two-fold:
>
> 1. Did the state have power to impose the tax?
> 2. Has the state failed to impose the tax? If these two questions are answered in the affirmative, then the municipality has the power to impose the tax." (6a-7a)

The guidepost to all statutory construction appears at the beginning of Article 4 of the Statutory

Construction Act of May 28, 1937, P. L. 1019. Section 51, 46 P. S. Section 551, commences:

> "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the Legislature."

When the words of a statute are not explicit, the courts and the legislature have set forth definite rules to follow in determining the intention of the legislature. The opinion of the court below, it is submitted, has failed to follow these rules.

One of the most familiar rules of statutory construction is that the legislature is presumed to have intended a constitutional result. Obviously, then, the legislature did not intend in 1932 to give the City the power to tax Federal salaries. The subsequent decision of the United States Supreme Court had no retroactive effect upon the legislature's intention as then manifested.

In construing legislation, it is no more than logical to consider the principles of constitutional law in effect at the time of enactment. Such principles are as much a part of the circumstances under which the law was enacted as any historical fact, and as such they are to be considered in determining the scope of the legislature's language:

> Section 51 of the Statutory Construction Act of 1937, 46 P. S. Section 551;
> **Orlosky v. Haskell**, 304 Pa. 57;
> **Phipps et al. v. Kirk**, 333 Pa. 478.

In the latter case, the court expressly held that the legislative intention in delegating taxing power to a municipality must be determined, inter alia, by examining the circumstances attendant upon enactment.

The judicial construction of prior statutes is written into subsequent legislation of a similar character just as fully as though the decisions were included verbatim. The interpretation placed on the prior enactments by the courts forms part of the General Assembly's intention in subsequent statutes, unless a different intention is expressed:

> *Bickley's Estate,* 270 Pa. 101, 106-107;
> *Lehigh County v. Sefing,* 289 Pa. 33, 36;
> *Barnes Foundation v. Keely et al.,* 314 Pa. 112, 122-123;
> *Bingamin's Estate,* 281 Pa. 497, 503;
> *Buhl's Estate,* 300 Pa. 29, 32;
> *Lerch's Estate,* 309 Pa. 23, 28;
> **Opperman's Estate (No. 2),** 319 Pa. 466, 468;
> **Lower Nazareth Twp. Supervisors' Appeal,** 341 Pa. 171, 175-176;
> **Electric Storage Battery Co. v. Shimadzu et al.,** 307 U. S. 5.

In the case last cited, at page 14, Mr. Justice Roberts stated, relative to Congressional legislation:

> "Congress has not seen fit to amend this statute in this respect, and we must assume that it has been satisfied with, and adopted, the construction given to its enactment by the courts."

Until the Sterling Act (1932) is specifically amended by the legislature to permit taxation of compensation paid by the Federal Government, that Act must be read as though the rule of the *Dobbins* case (1842), subsequently reiterated by the Court in *Short v. Upper Moreland Township School District,* 117 Pa. Superior Ct. 227, supra (1935), had been expressly written into the Act by the legislature.

The rule of the *Graves* case (1938) had not yet been announced by the United States Supreme Court and certainly did not by implication constitute part of the Act.

If, after the United States Supreme Court's decision in 1938, the legislature wished to take advantage of that decision and to entrust to the City of Philadelphia the power to tax Federal compensation, the appropriate method would have been to amend the Sterling Act. This was the method generally followed in other jurisdictions which had theretofore failed to tax Federal compensation.

An excellent illustration of this statutory process may be found in the Federal Income Tax Laws. Prior to the *Graves* decision, when the traditional constitutional rule of intergovernmental immunity was in effect, the Internal Revenue Code contained broad language taxing income from substantially every source, including income received from personal services, without any reference to State employes and officers. After the decision, however, the Federal Government realized that it might constitutionally tax their salaries. It is no mere accident that the Federal authorities refused to rely on the general language of the existing law. Instead, Section 22 (a) of the Code was expressly amended by Act of Congress of April 12, 1939, to include salaries received for "personal service as an officer or employee, or any instrumentality of any one or more of the foregoing."

The Congress proceeded further in connection with the change in constitutional law, by adopting the Public Salary Tax Act of June 29, 1939, as amended (26 U. S. C. A. Section 22), consenting to State taxation of compensation received for Federal services after December 31, 1938. As with the *Graves* case, however, the Public Salary Tax Act is not self-implementing.

The State must affirmatively exercise the power which the United States Supreme Court and Congress have now said the states may exercise over Federal compensation.

Just as the Internal Revenue Code extended the Federal Tax Laws after the *Graves* decision, to include compensation paid by the states, various states then extended their laws to tax Federal salaries. Many states enacted constitutional or statutory amendments which specifically included compensation to Federal employes in order to carry out the decision in the *Graves* decision. Among them are the following:

Ala.—Laws of 1939, H. B. No. 54.
Cal.—Laws of 1939, c. 915, Sec. 3.
Del.—Laws of 1939, c. 62.
Idaho—Laws of 1941, c. 12.
Iowa—Laws of 1939, c. 178, S. F. No. 467.
Minn.—Laws of 1939, c. 446.
N. Y.—Laws of 1939, c. 619.
N. C.—Laws of 1941, H. B. No. 11, Sec. 5 (a) (and also Revenue Act of 1939, Sec. 317).
N. D.—Laws of 1941, H. B. 248.
S. C.—Laws of 1939, H. B. No. 339 and S. B. No. 921.
Wis.—Laws of 1939, c. 293.

Other states, after 1938, including Arkansas, Georgia, Mississippi, Montana, Oklahoma, Utah and Vermont, positively demonstrated their intention to tax Federal salaries by repealing the clauses of exemption which had been part of their tax statutes prior to the *Graves* case.

Thus, substantially every state which has an income tax law and which has sought to tax Federal salaries has specifically amended its law accordingly.

In the absence of such an amendment by the General Assembly of Pennsylvania, it must be presumed that the legislature did not intend to include such salaries within the taxing laws of either the State of Pennsylvania or its political subdivisions.

If the Federal Government has found it necessary to refer to such salaries specifically, as have numerous of our sister states, it should be even more necessary where the legislature delegates its taxing power to a subordinate agency. If the General Assembly had intended to vest such power in the City of Philadelphia, it would have done so by specific words.

The City contends that, by virtue of dictum in *Blauner's, Inc. et al. v. Phila. et al.*, 330 Pa. 348, the City has the power to tax not only such subjects as could have been taxed by the legislature when the Sterling Act was passed in 1932, but also any power to tax which the state might subsequently have acquired. This is the effect of the City's argument, since the decision in the *Graves* case was tantamount to a constitutional amendment reserving broader tax powers to the State.

This argument overlooks the clear wording of the Sterling Act and the tense employed by the legislature. Manifestly, the General Assembly did not intend to delegate power in such a broad and unrestricted fashion to the City. The elementary canons of interpretation, as applied to taxing statutes, defeat the construction contended for by the City; otherwise, there would be a complete abandonment, in futuro, of the State's sovereign prerogative to a subordinate municipal corporation.

The following quotations should serve to answer the City's contention. In *New York & Erie R. R. Co. v. Sabin*, 26 Pa. 242, 245, the court said:

> ". . . the surrender [of the taxing power of the legislature] is not to be presumed, but must be evinced by terms so explicit as to leave no doubt of the legislative intention to part with it."

In *Hillman C. & C. Co. v. Jenner Township et al.*, 300 Pa. 108, 112, the court said:

> "'It is a principle universally declared and admitted that municipal corporations can levy no taxes, generally or special, upon inhabitants, or their property, unless the power be plainly and unmistakably conferred': 4 Dillon on Municipal Corp. 2398. And the ground of such right is to be strictly construed, and not extended by implication: Com. v. P. R. T., 287 Pa. 190."

The opinion of the court below, following the argument of the City, took the view that the decision of the Supreme Court in *Marson v. Philadelphia, et al.*, 342 Pa. 369, holding state employes liable for this tax, is authority to support the conclusion that Federal compensation is likewise taxable by the State. The holding of the *Marson* case is that the traditional rule of governmental immunity does not apply to the relationship between the State and its political subdivisions and, therefore, there has never been any constitutional prohibition of a city tax upon state salaries. The distinction between that case and the present case is obvious. In fact, the court brought the difference out in the following paragraph of the opinion (at p. 371):

> "It is the contention of appellant that 'if the traditional rule of governmental immunity is still the law in Pennsylvania, the result must be that no municipality in this State can levy a tax upon the salaries of officers and employes of the Commonwealth'. The 'governmental immunity' in-

voked is based on a principle applicable only to the taxing relations of the federal and state governments. There is a doctrine of implied limitation of the power of the federal government to tax a state or any of its instrumentalities, and of the power of any state to tax the federal government or any of its instrumentalities. The doctrine stems from McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579, and has frequently received judicial recognition."

The major difference between the two situations is that in 1932 it was lawful, constitutional and customary in Pennsylvania for municipalities to tax State occupations and salaries, **(C'm'rs of Northumberland County v. Chapman,** 2 Rawle 73; **Brown's Appeal,** 111 Pa. 72, 80, and intervening cases), whereas Federal officers and employes were considered and treated as immune from 1842 (*Dobbins* case, supra) until 1938 under the implied doctrine of immunity.

Although the Supreme Court has held that the General Assembly intended in 1932 to give the City the power to tax State employes, no such intention existed as to Federal salaries then enjoying immunity. The legislature intended to confer upon the City only such power as it then possessed or presumed it possessed, and was not exercised by the State. Certainly the State did not intend to delegate to the City unlimited and unrestricted power to tax all subjects which the State might subsequently acquire through constitutional change, whether by formal amendment or by judicial decision, or otherwise.

The necessity of discussing technical rules of statutory construction so extensively, is to be regretted, particularly when the legislative mind is so clear. If this argument, however, has created "any fair, reasonable doubt" as to the power which the City seeks to

exert, the judgment of the lower court should be reversed. In construing the Sterling Act, the controlling rule is that, whenever the power of a municipal corporation is called into question, "Any fair, reasonable doubt as to the existence of the power is resolved by the courts against its existence in the corporation, and therefore denied:"

Leslie v. Kite, 192 Pa. 268, 274;
Wentz v. Phila. et al., 301 Pa. 261, 271;
Valley Dep. & Tr. Co. of Belle Vernon, 311 Pa. 495, 497-498;
Fey's Appeal, 68 Pa. Superior Ct. 40, 42.

B. Congress by Public Act No. 819, Approved October 9, 1940, 4 F. C. A. Section 13 et seq., Prohibited Taxes on Salaries Earned During 1940 in Federal Areas Such as the Navy Yard.

(Assignment of Error 2.)

Appellant was employed during 1940 exclusively in the Philadelphia Navy Yard. The site of this Yard was ceded by the Commonwealth of Pennsylvania to the Federal Government under the Acts of February 10, 1863, P. L. 24, and April 4, 1866, P. L. 96, 74 P. S. Section 1 note. Congress accepted the same by Act of February 18, 1867, c. 46, 14 Stat. 396. By this transfer to the Federal Government complete jurisdiction passed from the Commonwealth of Pennsylvania, which thereby surrendered the right to tax persons and property within that area.

On October 9, 1940, Public Act No. 819 of the 76th Congress, 4 F. C. A. Sec. 13 et seq., was approved, ostensibly to remove the disability of state taxing authorities to reach subjects within such areas as the Navy Yard. Section 1 (a) provides for sales and use taxes, and Section 2 (a) for income taxes. The latter provision is as follows:

"Sec. 2 (a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area."

But this provision, as well as that of Section 1 (a) is expressly limited to transactions occurring after December 31, 1940, and subsection (b) of both sections prohibits tax prior thereto. Section 2 (b) reads as follows:

"(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940."

Congress thus intended to prohibit a tax on income received for services in Federal areas prior to December 31, 1940, and this prohibition bars any recovery by the City in the present case. The statement by the court below that this argument would apply only to non-residents employed at the Navy Yard is unsupported (8a).

The question may be asked whether, under the Federal Constitution, Congress can thus bar the City from taxing such salaries during 1940. In *Graves v. New York, ex rel. O'Keefe,* 306 U. S. 466, supra, at pages 478 to 479, the Court avoided this question, although previous decisions appeared to constitute full warrant for a prohibition against such taxation. The more recent decision in **Pittman v. H. O. L. C.**, 308 U. S.

21, would seem to remove the doubt. The State of Maryland's contention that Congress cannot "grant an immunity of greater extent than the constitutional immunity" was rejected by Chief Justice Hughes, (page 33,) with the following quotation from **M'Cullough v. Maryland**, 4 Wheat. 316, at page 426:

"A power to create implies a power to preserve."

As to compensation earned by Government employes in Federal area in 1940, the City Tax violates Section 2 (b) of the Act of Congress. The City cannot refuse to obey the Congressional mandate so clearly expressed.

C. A State or Municipal Tax on Compensation Paid to Federal Defense Workers Is Unauthorized.

(Assignment of Error 2.)

On May 27, 1941, the President of the United States proclaimed an unlimited national emergency, requiring that the country's military, naval, air and civilian defenses be put on the basis of readiness to repel any and all acts or threats of aggression toward any part of the Western Hemisphere. Of this proclamation and the situation which is becoming more and more serious, the Court may take judicial notice:

Angelicchio v. Director General of Railroads, 81 Pa. Superior Ct. 393, 396;
Com. ex rel. v. Ball et al., 277 Pa. 301;
Peterson et al. v. McNeely, 125 Pa. Superior Ct. 55;
Bell Tel. Co. of Pa. v. Pa. P. U. C., 135 Pa. Superior Ct. 218, 226, appeal dismissed 309 U. S. 30;
Ohio Bell Tel. Co. v. Comm'n, 301 U. S. 292, 301.

The Court is also fully acquainted with the fact that every person employed in the Navy Yard, as well as every person in the military, naval, and air services, is an integral part of the Government's effort to carry out the gigantic task which confronts the country.

The burden of the City's tax upon defense workers, civilian and non-civilian, in the Navy Yard, the training camps, and elsewhere, imposed simply because they live or perform their duties in Philadelphia, is a real burden upon the Government itself, apart from the added burdens of collection at the source and penalties which the City seeks to thrust upon the Government. A tax of this sort is calculated to affect the morale of those of our citizens who are receiving the small sum of $21. per month for patriotically surrendering their ordinary occupations and activities, or who are skilled workers and can obtain lucrative jobs elsewhere free from this municipal burden.

The inevitable consequence that this is burdensome on the Government and its defense operations is apparent. The Government should not be hampered at the present time with the necessity for increasing the compensation of those whom it now employs because of such local interference. It should not be confronted with discontentment and unrest for reasons of local municipal convenience. Nor should it be faced with a multiplicity of lawsuits which its employes must take time out to defend.

Nothing in the *Graves* case requires the conclusion that a state or municipal tax on Federal salaries cannot be a burden at any time or under any conditions on the Government itself. The Supreme Court has clearly left the way open for a decision that, in the unusual circumstances now existing, a tax upon defense workers has the effect of unduly burdening the United States of America. The means of carrying on our

national defense should not be subjected to local taxation:

U. S. Service Prod. Corp. v. Lincoln County et al., 285 F. 388;
Clallam County v. U. S. et al., 263 U. S. 341.

And, as stated at the beginning of this brief, the answer of the court below that public opinion will protect against enforcement of the tax power asserted by the City, is no solution in an orderly system of government. Anarchy should not be invited.

For the independent reasons that the state legislature has not delegated the required authority to the City, that Congress prohibited a tax on services performed in the Navy Yard during 1940, and that appellant is an essential part of the Government's machinery of defense, your Honorable Court is respectfully requested to reverse the judgment of the court below and to sustain the Affidavit of Defense.

Respectfully submitted:

EDWARD I. CUTLER,
MICHAEL FRANCIS DOYLE,
Attorneys for Appellant.

I hereby certify that the cases cited herein from other than the Official Pennsylvania Reports do not appear therein.

EDWARD I. CUTLER.

(31)

IN THE
Supreme Court of the United States

OCTOBER TERM, 1942. No. 198

NORMAN C. SHALLER
Petitioner

v.

CITY OF PHILADELPHIA

ANSWER AND BRIEF OF CITY OF PHILADELPHIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The answer of the City of Philadelphia to the petition for writ of certiorari to the Superior Court of Pennsylvania, respectfully represents:

1. The petition prays that a writ of certiorari issue herein to review a certain final decision of the Superior Court of the State of Pennsylvania. This final decision was rendered by the Superior Court of Pennsylvania on March 13, 1942; whereas the petition for writ of certiorari was filed in this Court on July 2, 1942, which is more than three months after the entry of the final judgment by the Superior Court.

2. The jurisdiction of the Superior Court of Philadelphia County is final in all appeals from judgments entered in the Municipal Court of Philadelphia County.

ACT OF MARCH 2, 1923, P. L. 3, Sec. 1; 17 PS 187.

3. The judgment in this case with all costs was paid by the petitioner on May 5, 1942 and, even if successful in reversing the decision of the Superior Court, the petitioner would not be entitled to an order of restitution.

ALLEGHENY BANK'S APPEAL, 48 Pa. 328, 334.

4. The petitioner is in error in arguing that on December 13, 1939, when the City of Philadelphia adopted the Income Tax Ordinance, the law had not been definitely settled that a State or any of its political subdivisions could not include in a general non-discriminatory income tax the compensation received by federal employes. This Court, prior to December 13, 1939, in GRAVES v. O'KEEFE, 306 U. S. 466, 83 L. Ed. 927; 120 A. L. R. 1466 held that a tax on income is not a tax on its source, as it is measured by income which becomes the property of the taxpayer when received for his service; and the tax laid upon the privilege of receiving it is paid from his private funds and not from the funds of the Government, either directly or indirectly.

The principle that a tax on income is not a tax on its source was recognized by this Court long before its decision in the GRAVES v. O'KEEFE case. Consequently, on December 13, 1939, the City of Philadelphia, having been given the power by the State to tax incomes, had the right to adopt a general non-discriminatory income tax which included the salaries received by federal employes residing in Philadelphia.

5. The petitioner is in error in arguing that the City has no right to tax the income of residents of Philadelphia earned outside of Philadelphia, for in SHAFFER v. CARTER, 252 U. S. 37, 57; 64 L. Ed. 445, 448, this Court said, in upholding an Oklahoma Income Tax:

"As to residents it *may*, and it does, exert its taxing power over their income from all sources, whether within or *without* the State."

6. The decision by the Superior Court of Pennsylvania that when a former decision is overruled, the reconsidered pronouncement will be treated as the law from the beginning, involves a principle of substantive law, and the decision of the highest court of this State on that question is binding on the Federal Court.

ERIE v. TOMPKINS, 304 U. S. 64, 82 L. Ed. 114 A. L. R. 1487.

7. Likewise, the construction of the STERLING ACT of August 5, 1932, P. L. 45, 53 PS 4613 by the highest court of the State of Pennsylvania is binding on the Federal Courts. Consequently, the decision of the Superior Court of Pennsylvania in this case that the City of Philadelphia had the power under the STERLING ACT to adopt the Income Tax Ordinance of December 13, 1939, is conclusive upon the Federal Court.

8. The petitioner's contention that Congress, in adopting the Act of October 9, 1940, 54 Stat. 1060, 4 U. S. C. A., Sec. 14, impliedly prohibited a State or Governmental agency from including in a non-discriminatory income tax the income received from the federal government, has no merit, and is fully answered in the opinion of the Superior Court, and on pages 16 and 17 of the brief of the City of Philadelphia filed in the Superior Court, which brief accompanies this answer. In any event, the petitioner in this case is in no position to avail himself of that argument, because he is a resident of Philadelphia. The statement of claim, which appears on pages 3 and 4 of the transcript of record, discloses in paragraph 6 that in March of 1941 he voluntarily made and filed with the Receiver of Taxes a return indicating that he earned during the year 1940 the

sum of $2,596.73, on which amount he owed a tax of $38.95, and at the same time voluntarily delivered to the Receiver of Taxes a check as payment on account of said tax; and in paragraph 7 that he stopped payment on the said check. Under the authority of SHAFFER v. CARTER, *supra,* his income would be taxable whether earned within or without the City of Philadelphia.

9. The contention by the petitioner that if he is compelled to pay this tax the defense work of the Government would be seriously and dangerously interfered with, is absurd, as it has no basis in fact or law. The petitioner is not in the military or armed forces of the Government; besides, this Court has already held that a tax on income is not a tax on its source. Consequently, the tax on the income of the petitioner, not being a tax on its source, could in no way interfere or hamper the defense work of the government.

10. Since the basic question involved in this case, namely, whether a tax on income is a tax on its source, has been decided on so many occasions by this Court, there appears no reason why it should be reviewed again.

Wherefore the City of Philadelphia prays your Honorable Court to dismiss the petition for a writ of certiorari.

And defendant will ever pray.

CITY OF PHILADELPHIA.
By WALTER CAMENISCH,
Deputy Receiver of Taxes in charge of Philadelphia Income Tax.

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No. 192

In the Superior Court of Pennsylvania

Philadelphia District

No. 335 October Term, 1941

CITY OF PHILADELPHIA,
Appellee

v.

NORMAN C. SCHALLER,
Appellant

BRIEF FOR APPELLEE

Appeal from the judgment of the Municipal Court of the County of Philadelphia, at of May Term, 1941, No. 55.

ABRAHAM L. SHAPIRO,
ABRAHAM WEISBERG,
Assistant City Solicitors,
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Philadelphia, Pennsylvania.

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INDEX TO BRIEF

I.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

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1. Are Federal employees, residing in Philadelphia, subject to a general income tax, regardless of where they perform their duties?

2. Does the Sterling Act of August 5, 1932, P. L. 45, (53 PS 4613) permit the city to impose a tax upon the income of non-residents earning such income in the city of Philadelphia; and residents of Philadelphia, regardless of where they earn their income?

II.

COUNTER-HISTORY OF THE CASE

On December 13, 1939, Councils of the City of Philadelphia enacted an Ordinance imposing a tax for general revenue purposes on salaries, wages, commissions and other compensation earned after January 1, 1940 by residents of Philadelphia, and upon non-residents of Philadelphia for work done or services performed or rendered in Philadelphia, at the rate of 1-½% of the salaries, wages, commissions and other compensation affected thereby. The tax was first imposed as to such salaries on those that were earned during the calendar year 1940 (see Ordinances of 1939, p. 656).

Persons whose earnings were subject to the tax were required on or before March 15th of each year to make and file with the Receiver of Taxes on the form furnished by him a return showing the aggregate amount of the salaries earned during the preceding year.

During the first two weeks of March, 1941, a number of Federal employees residing in the City of Philadelphia, working either at the Navy Yard or at other places, filed their returns with the Receiver of Taxes and delivered to the said Receiver of Taxes their checks either for the first quarter of the annual tax due or for the entire annual tax due.

Several days prior to the 15th of March, appellant's counsel sent a letter to the Navy Yard Association, advising that in his opinion the Federal

employees were not required to pay the City income tax. By reason of such letter, many of the Federal employees stopped payment on their checks.

After waiting for several weeks, the City then instituted in the Municipal Court suits in assumpsit against twenty-two Federal employees, working in the Navy Yard and in other places. In each Statement of Claim it was averred that a return had been filed by the particular employee, a check given and thereafter payment stopped.

The City in each Statement of Claim sought to recover not only the tax due, in accordance with the return filed, but in addition thereto, interest at the rate of 6% on the entire amount together with an additional ½ of 1% on the amount of unpaid tax for the first six months of non-payment and a penalty of $100., as required by the Ordinance.

After each of the defendants were served with a summons and a copy of the Statement of Claim, nine of those sued appeared at the City Solicitor's office and paid the amount of the check together with a $5.00 fine for stopping payment of the check and the costs of suit.

Several weeks after the said suits were instituted, Michael Francis Doyle, Esq. entered an appearance for thirteen of the twenty-two Federal employees that were sued, and a stipulation was entered into between Mr. Doyle and the City Solicitor that in the present case an Affidavit of Defense would be filed and that the judgment entered herein should control and be final and binding in the other twelve suits.

Thereafter, an Affidavit of Defense raising Questions of Law was filed in this case, claiming that

Federal employees, even though residents of the City of Philadelphia, were exempt from the City income tax because they work within a Federal reservation; and also because the City has no power to impose a tax upon the income of Federal employees.

The oral argument for the disposition of the Affidavit of Defense raising questions of law was continued on several occasions because appellant's counsel stated that the Federal government, through the Attorney General, desired to intervene and participate in the argument; and on one occasion a United States Assistant District Attorney appeared and asked for a continuance until the pleadings in the present case could be carefully studied in order to determine whether the United States Attorney General would participate in the argument.

After a long delay the United States Attorney General did not participate in the argument.

The matter was then argued by private counsel; and after such argument an opinion was filed by Judge Tumolillo overruling the questions of law raised and entering judgment in favor of the City of Philadelphia (R. p. 11a). The appeal to this court followed.

III.

ARGUMENT

1. ARE FEDERAL EMPLOYEES, RESIDING IN PHILADELPHIA, SUBJECT TO A GENERAL INCOME TAX, REGARDLESS OF WHERE THEY PERFORM THEIR DUTIES

The defendant in this case, Norman Charles Schaller, filed his return with the Receiver of Taxes on March 12, 1941 showing that he worked as a marine engineer in the Philadelphia Navy Yard, earning for the year 1940 a net sum of $2,596.73, and that he owed the sum of $38.95 as taxes under the Ordinance of December 13, 1939, which was at the rate of one and one-half percent. of the salary earned by him; and accompanied the said return with a check made to the order of the Receiver of Taxes for $38.95.

The Statement of Claim filed in this case avers that subsequent thereto he stopped payment on the said check and by reason thereof payment was refused and the check was returned marked "payment stopped" (R. p. 2a).

Paragraph 3 of the Statement of Claim recites the passage of the Ordinance of December 13, 1939 and paragraph 8 claims to recover this sum of $38.95, together with interest at the rate of 6%, penalties of $100.00 plus an additional ½ of 1% on the amount of unpaid tax for the first six months of non-payment.

Since the defendant in this case filed an Affidavit of Defense raising Questions of Law, all the averments of the Statement of Claim must be taken as true.

A reading of the Ordinance discloses that the tax is imposed for general revenue purposes upon the salaries, wages, commissions and other compensation earned by residents of Philadelphia, without any exceptions.

Section 2 reads as follows:

> "An annual tax for general revenue purposes of one and one-half percentum is hereby imposed on (a) salaries, wages, commissions and other compensation earned after January 1, 1940 by residents of Philadelphia;* * *"

It will thus be noted that Federal employes are not excepted, from the general language just quoted.

Many years ago, the Federal Courts did hold that the salary of Federal Judges can not be taxed by the State or its agencies. By reason of the strong dissent of Mr. Justice Holmes in the case of EVANS v. GORE, 253 U. S. 245, 265; 64 L. Ed. 887, 897; 11 A. L. R. 519, and decisions in the cases of GRAVES v. O'KEEFE, 306 U. S. 466, 83 L. Ed. 927; 120 A. L. R. 1466; and STATE TAX COMM. v. VanCOTT, 306 U. S. 511, 83 L. Ed. 950, it is now definitely established that no salary of any Federal employe, including a Judge's salary, is exempt from a *general* income tax by the State or any of its *governmental agencies.*

Mr. Justice Holmes in his dissenting opinion said:

> "In the first place, I think that the clause protecting the compensation of judges has no

reference to a case like this. The exemption of salaries from diminution is intended to secure the independence of the judges. * * * *That is a very good reason for preventing attempts to deal with a judge's salary as such, but seems to me no reason for exonerating him from the ordinary duties of a citizen, which he shares with all others.* To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge. I see nothing in the purpose of this clause of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being, if not their life, depends." (Italics supplied)

Mr. Justice Stone (now Chief Justice) in the case of GRAVES v. O'KEEFE, supra, stated the question involved as follows:

"We are asked to decide whether the imposition by the State of New York of an income tax on the salary of an employee of the Home Owners' Loan Corporation places an unconstitutional burden on the Federal Government."

In answering the question, he said (pp. 480, 486, 487):

"The present tax is a non-discriminatory tax on income applied to salaries at a specified rate. It is not in form or substance a tax upon the Home Owners' Loan Corporation or its property or income, nor is it paid by the corporation or the government from their funds. *It is measured by income which becomes the property of the taxpayer when received as compen-*

sation for his services; and the tax laid upon the privilege of receiving it is paid from his private funds and not from the funds of the government, either directly or indirectly. * * * In no case is there basis for the assumption that any such tangible or certain economic burden is imposed on the government concerned as would justify a court's declaring that the taxpayer is clothed with the implied constitutional tax immunity of the government by which he is employed. That assumption, made in Collector v. Day, supra, and in New York ex rel. Rogers v. Graves, supra, is contrary to the reasoning and to the conclusions reached in the Gerhardt case and in Metcalf & Eddy v. Mitchell, supra; Group No. 1 Oil Corp. v. Bass, 283 U. S. 279; James v. Dravo Contracting Co., supra; Helvering v. Mountain Producers Corp., supra; McLoughlin v. Commissioner, 303 U. S. 218. In their light the assumption can no longer be made. Collector v. Day, supra, and New York ex rel. Rogers v. Graves, supra, are overruled so far as they recognize an implied constitutional immunity from income taxation of the salaries of officers or employees of the national or a state government or their instrumentalities.

"So much of the burden of a non-discriminatory general tax upon the incomes of employees of a government, state or national, as may be passed on economically to that government, through the effect of the tax on the price level of labor or materials, is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power. The burden, so far as it can be said to

exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes, and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments." (Italics supplied)

In the latter case of STATE TAX COMM. v. VAN COTT, supra, Mr. Justice Black said (p. 515):

> "We have now re-examined and overruled the doctrine of Rogers v. Graves in Graves v. O'Keefe, Ante, p. 466. Salaries of employees or officials of the Federal Government or its instrumentalities are no longer immune, under the Federal Constitution, from taxation by the State."

In O'MALLEY v. WOODROW, 307 U. S. 277, 83 L. Ed. 1289, 122 A. L. R. 1379, Mr. Justice Frankfurter reviews the law as regards the immunity of a judge's salary from taxation from its earliest days and makes this significant statement:

> "To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government, whose Constitution and laws they are charged with administering."

From these decisions, it seems quite clear that Federal employees are not exempt from a *general* income tax merely because either *part* or *all* of the income of such Federal employee may be derived from compensation paid to them by the Federal Government.

The rule enunciated in the cases cited was recognized by the Supreme Court of this State as applicable to the present ordinance when it affirmed the decision of C. P. No. 7 of Philadelphia County on the opinion of Oliver, P. J. in upholding the constitutionality of the ordinance in question in the case of DOLE v. CITY OF PHILADELPHIA, 337 Pa. 375, 11 A. (2d) 163, wherein, in answering the attack upon the constitutionality of this ordinance because it imposes a tax upon public officers, it was said:

> "The modern view is that such constitutional provisions as the one relied upon are not intended to relieve public officers, judges included, from the just and necessary burdens of taxation".

In another case decided by President Judge Oliver, STOUDT v. CITY OF PHILADELPHIA, 38 D. & C. 222, 228, a group of railroad employes complained against the imposition of the tax under this ordinance upon them, on the theory that since they were paid for services rendered in interstate commerce, the ordinance in effect was a regulation or *burden* of such commerce. Dismissing that complaint, President Judge Oliver said:

> "A tax on the salary or wage which an employee receives for services *rendered in interstate commerce is not a tax on the commerce*

but on the return for his work realized by the individual. In the ordinary course, when an employee receives his salary or other compensation, he has performed his service, his part in the interstate transaction is at an end and the tax is upon what he has earned therefrom for his personal use and enjoyment. Such compensation to the employee is comparable in that respect to the net profits realized by the employer. Each represents what is available for the uses of the employee or employer respectively, after completion of the interstate commerce and in each case such return is taxable as property belonging to the recipient. Furthermore, the tax in the present case is not imposed on the corporation, firm, or individual engaged in carrying on interstate commerce for the purpose of making a profit therefrom, but only upon certain employees of such business ventures. For both of these reasons it is inconceivable that the tax now before us could have the effect of impeding or discouraging the conduct of interstate commerce. Necessarily, as in the case before us, it must be fair, and no greater than the tax on salaries and wages earned in intrastate business, or it would be invalid because discriminatory." (Italics supplied)

A case that might be of some interest in the consideration of this question is SAXE v. BOARD OF REVISION OF TAXES, 311 Pa. 545; 166 A. 853.

In that case the State Supreme Court held that despite the fact that a statute of the United States provides that no sum of money due to a pensioner shall be liable to attachment, etc. while in the course of transmission to the pensioner, a guardian who

received such money and invested the same in mortgages was not entitled to an exemption from the tax imposed by the Personal Property Tax Act of 1913. The opinion of Judge Baldrige, of the Superior Court, was adopted by the State Supreme Court. In the course of that opinion this language was used:

> "* * * exemption provisions must be strictly construed * * *. As a practical matter, it would be difficult, indeed, to earmark and trace money paid by the government, invested from time to time by the pensioner or his guardian in mortgages or real estate, and ascertain if all or part of such investments represent money exempt from taxation. Furthermore, it would result in changing the general rules of construction of state and federal statutes; *it would exempt a veteran from the payment of gasoline or a sales tax, etc., if purchase was made by money received from the federal government under the provisions of this act*". (Italics supplied)

This principle of law received further recognition by the Supreme Court of this State in MARSON v. CITY OF PHILADELPHIA, Pa. 21 A. (2d) 228 (A. R. 8-23-41).

But appellant, in spite of the foregoing decisions settling the law on this question, still argues that the present ordinance which taxes general income, when applied to income received from the federal government is "a real burden upon the government itself", and that it will interfere with defense work.

A similar contention was made by the writer of the appellant's brief in the instant case on behalf of the appellant in the Marson case, in that he argued

that this ordinance when applied to salaries of State employes will endanger or impair the efficiency of the State government. Mr. Justice Maxey, in answering that contention, said:

> "We find in the ordinance challenged, no attempted setting aside of the State's fundamental laws, and no danger to or impairment of, the efficiency of the State government".

Applying this language to the instant case, appellee contends that if this ordinance, when applied to salaries of State employes, is not considered as in any way interfering with the State government, likewise does it follow that it will not in any way interfere with the efficiency of the federal government.

If the City and State are to be prevented from imposing a tax on the income of federal employes simply because many of the federal employes are engaged in defense work, then might it not with equal force be contended that the State and the City could not reach the income of both employers and employes engaged in private industry, merely because they also are engaged in supplying material and equipment required in national defense? And if that contention were upheld then both state and municipal governments would be crippled and unable to carry on the general functions of government for the lack of revenue. Merely to state the proposition is the best proof of its absurdity.

It is difficult to understand why federal employes residing in Philadelphia should be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being, if not their

life, depends, as was so well put by Mr. Justice Holmes, in the case of Evans v. Gore, supra.

The most effective answer to such a theory is that the law does not consider federal employes as a privileged class, to be exempt from general taxation.

Appellant further argues that federal employees who work at the Philadelphia Navy Yard, and other federal buildings, title to which is in the United States, are working outside of Philadelphia, and, therefore, exempt from the provisions of this ordinance.

The City recognizes that League Island, on which the Philadelphia Navy Yard is located, was ceded to the United States Government by the Act of February 10, 1863, P. L. 24, and the Supplemental Act of February 4, 1866, P. L. 96 (74 PS 1 Note); and under such Acts, the federal government was given exclusive jurisdiction thereover, except for criminal or civil processes; and by reason thereof the area of the Philadelphia Navy Yard may be considered to be outside of the City of Philadelphia.

However, assuming that to be true, it does not follow that the salaries of such employes who reside in Philadelphia, are thereby exempt any more than the salaries of other employes residing in Philadelphia who work for private employers having their place of business outside of Philadelphia.

In the MARSON CASE, supra, a similar contention was advanced by the writer of the brief in the present case, namely, that the present ordinance could not apply to the salary of State employes residing in Philadelphia who perform their services

outside of the City of Philadelphia. Mr. Justice Maxey, in the opinion which he filed in the MARSON CASE, supra, states:

> "The court below held that the language of the 'Sterling Act' was so 'comprehensive and all embracing as to' include the appellant and all others similarly situated, and that the tax applied to State employes residing in Philadelphia" * * *
>
> "When the City of Philadelphia by its ordinance imposed a tax on the salaries, wages, commissions and other compensation earned after January 1, 1940, by 'residents of Philadelphia' it clearly meant *all* residents of that City' ". (Italics supplied)

When this language is applied to the present case it obviously means that federal employes residing in Philadelphia are also included within the language "it clearly meant *all* residents of that City".

In CANNON v. BRESCH, 307 Pa. 31, 34; 160 A. 595, Mr. Justice Drew, in considering the word "*all*" used in a lease, said:

> "The terms are emphatic—the word 'all' needs no definition; it includes everything, and excludes nothing. There is no more comprehensive word in the language, and as used here it is obviously broad enough to cover liability for negligence".

It, therefore, follows that when Mr. Justice Maxey considered the language of this ordinance as including *all* residents of the City of Philadelphia, he did not mean to exclude federal employes residing in Philadelphia, but, on the contrary, to include them.

Appellant further argues that by reason of the fact that on October 9, 1940 an Act of Congress was adopted, 4 U.S.C.A. 14 (Adv. Sheets of February 1941), providing that no person shall be relieved from liability for any income tax levied by any State or by any duly constituted taxing authority therein having jurisdiction to levy such a tax, by reason of his residing within a federal area or receiving income from transactions occurring or services performed in such area, and it shall be applicable only with respect to income or receipts received after December 31, 1940; that, therefore, it must be implied that prior to December 31, 1940 no State, or any of its governmental agencies had a right to tax income received by federal employes who were working within a federal area.

It is difficult to follow that contention. The Public Salary Tax Act of April 12, 1939, amended June 25, 1940, (26 U.S.C.A. 22) was adopted after the decision in GRAVES v. O'KEEFE, supra, was rendered; and yet it might as well be argued that, since Congress for the first time adopted an Act which granted the right of state taxing authorities to tax salaries of federal employes, that, therefore, prior thereto the State could not impose such a tax. Such an argument is entirely destroyed by the fact that the Supreme Court of the United States, prior to the passage of the Public Salary Tax Act, decided that salaries of federal employes could be taxed by the State and its agencies.

That Act had two purposes, (a) to declare the existing law, (b) to prohibit the Secretary of the Treasury from attempting to collect the tax based on the salaries of public officials earned prior to December 31, 1938. The adoption of that Act is

a complete refutation of appellant's contention, because it amounts to a recognition by Congress that the taxation of salaries of public officials in every department of the federal government cannot possibly interfere with federal functions (since consent is clearly given to States and other taxing agencies to impose such taxation); as well as a recognition by Congress that the right to tax such salaries had always been the law, though most public agencies mistakenly thought otherwise. Congress in order to prevent the presentation of tax bills to such officials restricted the right of the Secretary of the Treasury to collect these taxes OTHERWISE THE SECRETARY OF THE TREASURY COULD HAVE CLAIMED AND COLLECTED TAXES FROM PUBLIC OFFICIALS EARNED BY THEM DURING THE TIME WHEN THE SUPREME COURT OF THE UNITED STATES HAD HELD THAT SUCH SALARIES WERE NOT TAXABLE. The adoption by Congress of the Act of October 9, 1940 likewise amounts to an acknowledgment by Congress that the taxation of federal employes *even though employed on federal reservations is not an interference with the defense program*, for it must be borne in mind that when that Act was adopted the President had already declared a state of emergency.

2. DOES THE STERLING ACT OF AUGUST 5, 1932, P. L. 45, (53 PS 4613) PERMIT THE CITY TO IMPOSE A TAX UPON THE INCOME OF NON-RESIDENTS EARNING SUCH INCOME IN THE CITY OF PHILADELPHIA; AND RESIDENTS OF PHILADELPHIA, REGARDLESS OF WHERE THEY EARN THEIR INCOME?

The Affidavit of Defense raising Questions of Law assigns as a second objection to the right of the City to maintain its claim that the City has no power under the Constitution and laws of the Commonwealth of Pennsylvania, including the Act of August 5, 1932, P. L. 45, to exact the aforementioned tax (R. p. 4a).

It is difficult to understand the purpose of the defendant in claiming that there is any prohibition in the State Constitution upon the City to impose a tax upon the income of residents and non-residents who earn their money here. Plaintiff does not know of any provision in the State Constitution relating to such a prohibition.

Besides, the constitutionality of this Ordinance has already been passed upon on three different occasions by the Court of Common Pleas No. 7 namely, DOLE vs. CITY OF PHILA., 337 Pa. 375, 11 A. (2d) 163; JOHN B. DOUGHTEN v. CITY OF PHILA., C. P. No. 7, March 1940, No. 1410, and STOUDT et al. v. CITY OF PHILA., 38 D. & C. 222. The decision of C. P. No. 7 in the Dole case was affirmed by the Supreme Court of Pennsylvania.

The constitutionality of this Ordinance was also passed upon by the Supreme Court in a case of a

State employe, namely, MARSON v. CITY OF PHILA., 21 A. (2d) 228.

The constitutional objections raised by the defendant seem, therefore, to be foreclosed against him.

The defendant also includes in his second objection the Act of August 5, 1932, P. L. 45, 53 PS 4613, known as the "Sterling Act".

Plaintiff respectfully urges that this very objection was also passed upon by the Supreme Court of Pennsylvania in the DOLE case and MARSON case, supra.

Section 1 of that Act provides:

> "It is the intention of this section to confer upon cities of the first and second classes the power to levy, assess and collect taxes upon *any and all subjects of taxation* which the Commonwealth has power to tax but which it does not now tax or license." (Italics supplied).

The words "*any* and *all* subjects of taxation" indicate very clearly that it was the intention of the Legislature to grant to the City the same broad powers of taxation that the State of Pennsylvania has, except as regards subjects that the State already taxes. Indeed, the Supreme Court of Pennsylvania in BLAUNER'S, INC. v. CITY OF PHILA., 330 Pa. 340, 348, 198 A. 889 so decided when it said that "under such a broad legislative grant, the city's power of collection is limited only by constitutional restrictions", thereby intending to say that the City had the statutory authority to impose tl e tax here complained of.

It follows that if the City has the same broad powers that the State has in its taxing powers, being limited only by constitutional restrictions, and since no constitutional restrictions can be pointed out, that the City would have a right to include in an Ordinance taxing the general income, Federal employes residing in Philadelphia even though some or all of their income may be obtained from the United States Government.

In the MARSON case, supra, the writer of appellant's brief in the instant case, argued that the Legislature in adopting the Sterling Act could never have intended to empower the City of Philadelphia to levy taxes against State employes, and since the Sterling Act failed to specify State employes as being subject to the tax they are, therefore, excluded. This is obvious from the language of Mr. Justice Maxey in the MARSON case, which is as follows:

> "Appellant contends that because the 'Sterling Act' failed to specify employes of the State as being subject to the tax they are therefore excluded".

Mr. Justice Maxey answered this contention as follows:

> "The court below held that the language of the 'Sterling Act' was so 'comprehensive and all embracing as to' include the appellant and all others similarly situated, and that the tax applied to State employes residing in Philadelphia".

Again, attention is called to the words used in the Sterling Act, namely, "any and all subjects of taxation".

The words "any and all" are in the language of Mr. Justice Drew in CANNON v. BRESCH, supra, all inclusive, sufficient to bring within their meaning federal employes.

Appellant, apparently realizing that the decision in the MARSON case would foreclose any contention that since in 1932, when the Sterling Act was adopted, the City had no power to tax Federal employes, and, therefore, the Legislature did not intend to grant such power to the City; attempts to escape the consequences of that decision by arguing that the MARSON case may be distinguished from the present case because in 1932 it was lawful, constitutional and customary in Pennsylvania for municipalities to tax State occupations and salaries, whereas Federal employes were considered as immune until 1938 under the implied doctrine of immunity (appellant's brief, p. 17). But the writer of the brief in the present case argued just the contrary in the MARSON case. There he argued that the City had no power to tax State employes.

The appellant cites Dobbins v. Erie County, 16 Peters (41 U.S.) 435, 10 L. Ed. 1022, wherein the Supreme Court of Pennsylvania was reversed (7 Watts 513) in upholding a tax adopted by the County of Erie on posts of profit offices, occupations, etc., when a levy was made upon the office of a captain of the United States Revenue Service at Erie Station. It is true that the Supreme Court of the United States held that this tax was unlawful when applied to the office of a captain of a United States Revenue cutter, but it does not follow that a general income tax would have been declared illegal, even though it would have reached the salary of a federal officer.

As a matter of fact, in the case of COMM. v. MANN, 5 W. & S. 403, 417, with the decision of the United States Supreme Court in the DOBBINS case before it, because it referred to the case in its decision, although striking down a tax against the salaries of an office created or held by or under the *constitution* of this commonwealth, said:

> "The property of a judge, his income, whether derived from this or any other source, we admit is a proper subject of taxation".

It will thus be seen that the Supreme Court of Pennsylvania, almost a century before the United States Supreme Court finally settled the law on the subject, carefully distinguished between a tax *levied directly upon the salary of a Judge*, and upon income *measured by the judge's salary.*

Appellant points out that the traditional rule of the DOBBINS case was as recently recognized by this Court as March 13, 1935, in Short v. Upper Moreland Township School District, 117 Pa. Super. Ct. 227, 177 A. 480. An allocatur from the decision of Judge Cunningham was refused by the State Supreme Court, 117 Pa. Super. XXVII; and the United States Supreme Court dismissed an appeal in 296 U. S. 663, 80 L. Ed. 383; and denied a rehearing, 296 U. S. 663; 80 L. Ed. 473. In that case the School District of Upper Moreland Township in the year 1930 levied a tax of five dollars on each resident thereof over twenty-one years of age, which continued in 1931, while in the year 1932 the tax was fixed at three dollars. This was done under the provisions of Section 542 of the Act of May 18, 1911, P. L. 309, amended on May 11, 1921, P. L. 508, Sect. 4.

The plaintiff, challenged the validity of the tax as against him because he was a mail clerk in the employ of the United States government, claiming that he was exempt on the ground that State Governments cannot levy a tax upon the constitutional means employed by the government of the union to execute its sovereign power. He further argued that as a mail clerk he is such a means; that the tax is laid directly on him; and so upon the means; and that consequently it falls within the exemption claimed.

It may be of interest to observe that, although the appellant in the case at bar, argues that in 1932 the law in Pennsylvania was settled that the salary of federal employes could not be included in a general State tax, yet Judge Cunningham in the cited case said:

> "The rule itself, as a general proposition, cannot be challenged; but the question here involved is whether it is applicable to the facts at bar. Appellant has neither cited, nor have we found, a case in which the precise point has been decided".

From this language it would appear that the appellant is in error when he argues in the case at bar that in 1932, when the Sterling Act was passed, it was the settled law in the State of Pennsylvania that the salaries of federal employes could not be subjected to a State or municipal tax levied without discrimination on all residents of the district.

Judge Cunningham reviews many of the decisions of the Federal Court relating to this subject matter, and comes to the following conclusion:

> "If such is the rule, even where the tax is measured in part by the amount of exempt income received, it is unnecessary to labor the point that there is no real interference with a federal instrumentality by the small flat tax here involved".

It is respectfully submitted that Judge Cunningham's opinion is a complete answer to the appellant's contention in the case at bar; and that up to 1932 it had not been decided in this State that the wages of a federal employe is exempt from a general income tax.

The DOBBINS case is distinguishable because it was a tax on a Federal office. The case of COMM. vs. MANN, supra, clearly illustrates that in this State the law up to 1932 was that a non-discriminatory tax laid generally on net income was not, when applied to the salary of a particular individual, a diminution of his salary even as against a constitutional mandate forbidding diminution of such salary. And if there is no diminution, then there is no burden on the source from which the salary flows.

The MANN case was cited by Solicitor General Robert H. Jackson, in the case of O'MALLEY vs. WOODROW, supra, where Mr. Justice Frankfurter pointed out that the decision of EVANS vs. GORE, supra, was rejected by most of the Courts before whom the matter came after that decision.

Appellant further cites many cases in support of the rule that in considering the meaning and intention of the Legislature in adopting an Act of Assembly, the court should consider the interpretation placed by the courts upon an earlier Act containing similar language. That rule is not question-

ed, but it has no application to the question involved. No earlier interpretation of the provisions similar to those of the Sterling Act was involved in any decision in this Court, or any other court of Pennsylvania, as there was no earlier Act containing similar provisions.

The appellant contends that by the Sterling Act the City is limited to the imposition of taxes upon such subjects as the State *then* had power to tax, and arguing, though erroneously, that the State had no power to tax federal employes in 1932, he draws the conclusion that the City now has no such power, though the State may have. A somewhat similar argument was made in BANGER'S APPEAL, 109 Pa. 79, 90, 91 (1885), in which case a statute was under consideration which gave municipalities of the third class the right to impose taxes on occupations, etc. which were taxable for either State or County purposes. The following quotation from that opinion shows the Supreme Court's reaction to that argument, and is a complete answer to the argument made here:

> "It was contended, however, that as there is no state tax on 'occupations', it is not enough to show that they are made by law taxable for county purposes. In other words, before the city can show that she can tax any species of property it must appear that such property is taxable both for state and county purposes. We regard this as a narrow view of the Act of 1875. It was evidently intended to authorize cities of the third class to levy a tax upon any species of property which is at the same time taxable for either state or county purposes. The state limits its taxation to few

subjects. Real Estate is entirely exempt. If we sustain the contention of the appellants the city could not tax the real estate within its limits, and upon the same principle many other prolific sources of revenue would escape taxation altogether by the municipality. It could not raise revenue to light its streets or pay its policemen".

BANGER'S APPEAL, supra, at pp. 90, 91.

The Legislature in adopting the Sterling Act intended to, and did delegate to the City of Philadelphia its inherent taxing power which included not only such power as it then possessed, but all that it could subsequently exercise. Consequently, when in 1939 it was settled by the United States Supreme Court that salaries of federal employes are not exempt from general income taxes, it followed that the State of Pennsylvania always had authority to reach salaries of federal employes by a general income tax, *which power was delegated to the City of Philadelphia under the Sterling Act.*

If the appellant's argument on this point were valid, then the decision of the Supreme Court of the United States in GRAVES v. O'KEEFE, supra, would be incorrect, for when Congress adopted the various income tax laws salaries of State employes were immune from federal taxation. Consequently, following the appellant's argument, the Supreme Court of the United States in 1939 was bound to adopt the interpretation put by the Court on the income tax law in existence at that time in conjunction with the theory of government immunity. Yet, without an Act of Congress amending the federal income tax so as to fall in line with the new theory of no government immunity, the Su-

preme Court of the United States declared that the salaries of federal employes were not exempt from a State income tax, and, likewise, would not the salaries of State employes be exempt from federal income tax.

This again refutes the contention advanced by the appellant.

It is, therefore, respectfully submitted that the law as announced in 1939 by the United States Supreme Court must necessarily be read into the Sterling Act, and that under it the State Legislature delegated to the City of Philadelphia the same broad powers which it had, which included the right to adopt a general income tax under which the salaries of federal employes would be included.

CONCLUSION.

Appellant is fearful that if this ordinance is applied to the $21.00 per month received by those serving in the training camps and in the military, naval and air services, it would affect their morale and would seriously interfere with the defense program.

It comes with bad grace for the defendant to rush to the rescue of those earning $21.00 per month in order to enable himself to escape the payment of $38.95 to the City that affords him the opportunity to live here and protects him and his family from all hazards and dangers, when he is earning a salary of $217.00 a month.

Since he is not a member of the class that he seeks to protect, he is in no position to complain of any application of the ordinance to that class.

It may be of interest to note that no complaint is made by the Government itself to this tax and when appellant attempted to induce the Attorney General of the United States to protest against this tax by joining him in his attempt to evade the payment of the tax, he was unsuccessful. What stronger proof is required to demonstrate that the official representative of the Government did not believe that the payment of $38.95 by the defendant will endanger the defense of this country, or drive the orderly system of government to anarchy.

It is to be deplored that the defendant in this case has to resort to trading on the patriotism of those gallant young men who have joined the armed forces of this country at a great sacrifice to themselves in order to help this country to prepare against the foes of democracy, so that he may be spared the duty of contributing in a small measure to sustain the very municipal government that permits him to enjoy the results of the compensation that he receives from the government.

If defendant's contention were to be taken seriously, then following the reasoning of the Court in SAXE vs. BOARD OF REVISION OF TAXES, supra, the thousands of federal employees residing in this city, who, out of the generous compensation received from the government are able to buy their own homes, would then be in a position to contend that they are exempt from the payment of city real estate taxes; or if they own personal property

subject to the personal property tax, they could contend that they were exempt from the payment of such taxes simply because their compensation is received from federal funds, that to be compelled to pay such taxes would result in seriously endangering national defense and result in anarchy. In fact, to drive such arguments to a point of absurdity, it might even be contended by such federal employees that they ought not to pay for food, clothing, lodging or any other of the necessities of life because their compensation comes from federal funds and to so utilize those funds would be interfering with national defense work. Sustaining these contentions would result in creating a privileged class consisting of federal workers who receive substantial amounts of salary from the federal government out of funds contributed by the law abiding, faithful and patriotic citizens other than those receiving compensation from federal funds, who would be permitted to retain those funds and live off the monies contributed by others. If there is any fear of anarchy arising in this country, such a situation would be more conducive to creating a condition of anarchy.

Congress in enacting and the President, in signing the act of October 9, 1940, removed any right on the part of federal employees in performing services in a federal area to claim any exemption from state or municipal taxation by reason thereof, thus showing they did not believe that the national defense work of this country would be in any way interfered with when federal employees would contribute to the support of the state and municipal governments affording them the right to live therein and receive protection from them.

The defendant might as well argue that when he is compelled to pay the many burdensome federal taxes out of the salary that he receives from the federal government, that the federal government itself is crippling and seriously endangering national defense.

It is respectfully urged upon this Court that the same reasons which persuaded the Supreme Court to dismiss the appeal filed by the State employes in the MARSON case are applicable to the contentions made by the appellant here, and that a tax which applied to State employes has been held not to interfere with State functions must of necessity be held to constitute no interference with federal functions when applied to federal employes.

It is respectfully submitted, therefore, that the appeal should be dismissed.

Respectfully submitted,

ABRAHAM L. SHAPIRO,
ABRAHAM WERNICK,
Assistant City Solicitors.
FRANCIS F. BURCH,
City Solicitor,
Attorneys for Appellee.

I hereby certify that cases cited from other than official reports do not appear therein.

ABRAHAM WERNICK.

Supreme Court of the United States

October Term, 1942.

No. 198.

NORMAN C. SCHALLER, *Petitioner,*

v.

CITY OF PHILADELPHIA.

Petitioner's Reply and Reply Brief on Petition for Writ of Certiorari.

MICHAEL FRANCIS DOYLE,
EDWARD I. CUTLER,
Attorneys for Petitioner.

International, 311 Chestnut St., Philadelphia

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IN THE

Supreme Court of the United States.

No. 198. October Term, 1942.

NORMAN C. SCHALLER,

Petitioner,

v.

CITY OF PHILADELPHIA.

PETITIONER'S REPLY AND REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The reply of Norman C. Schaller, Petitioner, by his attorneys, to the City of Philadelphia's Answer to the Petition for Writ of Certiorari to the Superior Court of Pennsylvania respectfully represents:

(1) Although the petition for writ of certiorari was filed more than three months after the entry of judgment by the Superior Court of Pennsylvania, it was entered less than three months after the order of the State Supreme Court refusing the allowance of an appeal on April 20, 1942 (R. 24).

(2) The Superior Court is not the state court of final appellate jurisdiction on judgments entered in the Municipal Court of Philadelphia. Section 1 of the Act of March 2, 1923, P. L. 3, No. 1, 17 P. S. § 187, cited by respondent for the contrary proposition, provides as follows:

> "From and after the passage of this act, appeals from any order, judgment, or sentence of the County Court of Allegheny County, or the Municipal Court of Philadelphia, or any similar court hereafter created, not provided by law to be taken to the court of common pleas or court of quarter sessions of the peace of the particular county shall be taken to and heard by the Superior Court, and *shall not be appealable to the Supreme Court, except upon allowance as in the case of other orders, judgments,* and sentences of the Superior Court." (Emphasis supplied.)

It is well established that the Superior Court is not the court of final appeal in Pennsylvania. The Constitution of that State sets up the Supreme Court as the highest appellate tribunal in that State: Art. V, § 3. The Act of Assembly which created the Superior Court (Act of June 24, 1895, P. L. 212, § 1, 17 P. S. § 111) commences with the following language:

> "A court of intermediate appeal is hereby established to be called the superior court . . ."

Section 7 (e) of the Act of 1895 (17 P. S. § 190), expressly provides for appeal from the Superior to the Supreme Court of Pennsylvania in the following instances:

> ". . . Second. If the case involves the construction or application of the constitution of the United States or of any statute or treaty of the United States; or
>
> ". . . Fourth. If the appeal to the supreme court be specially allowed . . . by any one justice of the supreme court."

Forty-five days are allowed by state law for presentation of a petition for the allowance of an appeal under the forego-

ing section: Act of May 11, 1927, P. L. 972, § 1, 12 P. S. § 1136. The petition in the present case was well within that time.

Even though the question of constitutionality or Federal law appears to be appealable to the State Supreme Court as a matter of right, the practice has been to file a petition for allowance nevertheless:

Commonwealth v. Gardner, 297 Pa. 498, 147 Atl. 527;

In re Melon Street, 182 Pa. 397, 38 Atl. 482.

Obviously, despite this practice, the Supreme Court of Pennsylvania has final appellate jurisdiction in matters of Federal law which originate in the Municipal Court of Philadelphia, as in the instant case.

Moreover, the time for appeal to this Honorable Court is computed from the date of refusal of an appeal by the highest state court where the allowance of an appeal from an intermediate court is discretionary. This rule was clearly enunciated in litigation originating in Louisiana where the constitution made review by the highest state court discretionary. This Court held that the limit of time for applying here for certiorari dates from the refusal of such a state court to review the decision of the intermediate court:

American Express Co. v. Levee, 263 U. S. 19, 21.

Under the Fourth Paragraph of Section 7 (e) of the Act of 1895, above quoted, the highest appellate court of Pennsylvania has similar discretionary power to grant or refuse an appeal from the intermediate appellate court in all cases where the appeal is not mandatory:

Kraemer v. Guarantee Trust and Safe Deposit Co., 173 Pa. 416, 33 Atl. 1047.

Respondent's contention that the petition for writ of certiorari was not timely is, therefore, erroneous and unfounded. It completely ignores the requirement that a litigant must exhaust his remedies under the state judicial system before resort to this Court. It also ignores the settled practice of this Court in the *American Express Company case,* as well as the express wording of the state legislation which has been cited.

(3) Payment of the judgment in this case by petitioner does not deprive him of his standing on appeal under the decisions of this Court.

Petitioner respectfully calls the Court's attention to the fact that the payment was made only after a written threat of execution by respondent's counsel, a copy of which is annexed hereto as Exhibit "A". This threat was not intended as a threat of execution merely by civil process but also by criminal prosecution. The respondent has carried out a similar threat against numerous other employes of the Federal Government for non-compliance with the decision of the court below, notwithstanding notice given by petitioner's counsel that the present application for a certiorari is pending. The situation raises a clear inference that the respondent has singled out for prosecution Federal employes from numerous persons who have not paid the city wage tax, and that there has been discrimination against Federal employes in the enforcement of the wage tax ordinance in this manner. The section of the Income Tax Ordinance of the City of Philadelphia under which the threat against the petitioner was made in this case, is as follows:

"SECT. 9. VIOLATIONS; PENALTIES. Any person who shall fail, neglect or refuse to make any return required by this ordinance, or any taxpayer who shall fail, neglect or refuse to pay the tax, penalties and interest imposed by this ordinance, or any person who shall refuse to permit the Receiver of Taxes or any agent or employee appointed by him in writing to examine his books, records and papers, or who shall knowingly make any incomplete, false or fraudulent return, or who shall attempt to do anything whatever to avoid the full disclosure of the amount of earnings or profits to avoid the payment of the whole or any part of the tax, *shall be subject to a fine or penalty of one hundred (100) dollars and costs for each such offense or to undergo imprisonment for not more than thirty days for the non-payment of such fine or penalty and costs within ten days from the imposition thereof.* (Emphasis supplied.)

"Such fine or penalty shall be in addition to any other penalty imposed by any other section of this ordinance.

"The failure of any employer or any taxpayer to receive or procure a return form shall not excuse him from making a return."

Upon respondent's threat of execution pursuant to the foregoing provision and pursuant to provisions of state law for execution of judgments, petitioner paid the judgment under protest. The check contained on its face the limitation that it was being paid under protest, and the letter of transmittal from petitioner's attorney stated:

"These payments are made under protest and only because of your threat to issue execution.

"We are now arranging an appeal to the Supreme Court of the United States in the case of City v. Schaller, so that the matter may be finally determined by the highest Court."

It has long been the rule of this Court that the performance of a judgment or decree does not deprive the performing party of the right of appeal. No release of errors is implied from the fact that money or property has changed hands by virtue of the court's order. Compliance with the order of the court below does not render the issue moot on appeal. It has been stated:

> "There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money. The defendant has merely submitted to perform the judgment of the court, and has not thereby lost his right to seek a reversal of that judgment by writ of error or appeal:"

2 Enc. U. S. Supreme Court Reports 81.

This court has expressly decided that a party may pay a judgment and then appeal here: *Dakota County v. Glidden,* 113 U. S. 222, 224. This rule is based on the early decisions in *Erwin v. Lowry,* 7 How. (48 U. S.) 172, 184; *Gregg v. Forsyth,* 2 Wall. (69 U. S.) 56; *O'Hara v. MacConnell,* 93 U. S. 150.

The Encyclopedia of U. S. Supreme Court Reports, heretofore cited, further states:

> "The payment of taxes, whether voluntary or compulsory, after the dismissal of a suit to enjoin its collection, constitutes a waiver of the right to appeal."

It does not follow that a payment of a judgment for taxes prevents an appeal therefrom. The decision in *Singer Manufacturing Company v. Wright,* 141 U. S. 696, was merely that a taxpayer who sought injunctive relief against a tax but was denied that relief, and then paid the

tax before appeal, lost his right to appeal because he lost his right to equitable relief by paying the tax. It must be noted that there was no payment of a judgment in the case. In *Little v. Bowers,* 134 U. S. 547, the taxes which were paid to avoid execution were not the taxes in controversy. As stated on page 554 of that opinion, there was no threat of execution for the taxes in litigation.

In the present case there was a definite threat of execution by the respondent. This threat was carried out as to other Federal employes not only in the form of civil process but also criminal prosecution. The threat of execution was as to the very taxes in controversy. The action was not a taxpayer's proceeding for injunctive relief but was a proceeding begun by the taxing authority to enforce and collect taxes from the petitioner. The payment was of the judgment entered in the court below, and there was no compromise or settlement as in *Dakota County v. Glidden,* 113 U. S. 222, supra. Clearly the petitioner should not be refused an appeal because of his payment made under duress and under protest.

Respondent would have the Court believe that payment of the judgment on threat of execution renders the appeal moot by virtue of Pennsylvania law, citing dictum in *Allegheny Bank's Appeal,* 48 Pa. 328, at 334, that petitioner has no right of restitution.

The decisions of this Court above cited establish that this Court's appellate jurisdiction does not depend on the appellate rules of state courts. Petitioner and thousands of other Federal employes should not be deprived of their right to contest the Philadelphia City Income Tax in this Court, notwithstanding petitioner's inability to obtain restitution under State law, if such were the case.

The fact is, however, that State law does not prohibit such restitution. The early dictum cited by respondent has not been followed in recent decisions involving payment to avoid the threatened enforcement of judgments by execution process.

In *Charak v. Porter Co.,* 288 Pa. 217, 135 Atl. 730, the Supreme Court of Pennsylvania stated at pages 220 to 221:

> "Defendants thereupon under duress of the execution, paid to the sheriff the amount of the judgment, who in turn handed it over to plaintiff. Appellees now claim the questions involved in the appeal are moot. In this they are wrong, . . .
>
> "Notwithstanding the execution, the statute gives an unquestioned right to appeal within three months though it may not operate as a supersedeas. Under such circumstances, if an appellant pays the judgment, and later is successful in his appeal, an order of restitution will be made to carry out the judgment of the court. See Drabant v. Cure, 280 Pa. 181, 189."

More recently the Superior Court of Pennsylvania stated, in *J. P. Cope Hotels Co. et al. v. Fidelity-Phenix F. Ins. Co.,* 126 Pa. Superior Ct. 260, 191 Atl. 636, allocatur refused by the State Supreme Court, 126 Pa. Superior xxix, at page 269:

> "On the motion to dismiss the appeal, we are of the opinion that the payment of the judgment following an execution issued after an appeal, which was taken too late to be a supersedeas, did not render the question involved moot. It was ruled otherwise in *Charak v. Porter Co.,* 288 Pa. 217, 220, 221, 135 A. 730."

Furthermore, in the event of a reversal in this case, petitioner has a right to a refund of the taxes paid, under

the terms of Pennsylvania law, so that the question of restitution is unimportant. Assurances of the right to a refund have been made by the signer of respondent's answer.

Respondent is attempting to frustrate the purpose of the Pennsylvania courts and of the persons vitally concerned in this case to have the highest court in the land pass upon a question which is rightfully before it. Attention is respectfully invited to the language of the Superior Court indicating that such a review was contemplated by the Court (R. 16).

EDWARD I. CUTLER,
MICHAEL FRANCIS DOYLE,
Attorneys for Petitioner.

EXHIBIT "A."

CITY OF PHILADELPHIA
Department of Law
City Hall Annex

Francis F. Burch
City Solicitor

March 24, 1942

Michael Francis Doyle, Esq.
1500 Girard Trust Building
Philadelphia

Dear Mr. Doyle:

I intend to issue an execution in the case of City of Philadelphia v. Norman C. Schaller, Municipal Court, May Term, 1941 No. 55 unless the judgment entered in the aforesaid case is paid within forty eight hours.

Yours very truly,

(Signed) ABRAHAM WERNICK
Assistant City Solicitor

AW*SIH

End